93-742

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JASON STEGE and JUSTIN STEGE,

Petitioners

v.

C. JOSEPH GIRARD and MITCHELL B. TRIMMER,

Respondents.

Petition for a Writ of Certiorari
to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Has qualified immunity become an impervious shield for police officers who violate established constitutional rights?

(2) Has the exigent circumstances exception dispensed with the warrant requirement of the Fourth Amendment?

The Decision of the Tenth Circuit Court of Appeals finds that the Defendants are entitled to qualified immunity because "the law at the time of this incident did not clearly establish whether these offenses were sufficient to justify a warrantless entry based upon probable cause and exigent circumstances." The offenses referred to are "disorderly conduct and the possession, by and the provision of liquor and alcoholic beverages to, those under age 21, which are petty misdemeanors." The Decision went on to state that "the offense of contributing to the delinquency of a minor, a fourth degree felony... was also implicated". This statement is in error because it overlooks the fact that Lt. Girard, the officer in charge who ordered the entry into the Stege home, stated in his affidavit filed February 14, 1992 at paragraph 7 that "**after** entering the residence and considering the circumstances I **considered** that contributing to the delinquency of minors **might** be an appropriate charge against the

Stege brothers. (emphasis added) This Court evaluates Defendants' actions based on the facts known to Defendants before they made the challenged entry into the Stege home. It is also important to note that Defendants Girard or Trimmer did not charge any person at any time with contributing to the delinquency of a minor and no mention of such a charge is found in any of the police reports but rather first appears in the affidavit prepared to resist Plaintiff's motion for summary judgment.

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JURISDICTION AND PRIOR APPEALS

This is an appeal of an action for violation of Federal Civil Rights. Jurisdiction of the district court was invoked under 28 U.S.C. 1331 and was not disputed below. This is an appeal from the Final Decision of the District Court entered on October 22, 1992 (Appendix, Page 1) the Notice of Appeal was filed October 30, 1992. The Tenth Circuit Court of Appeals entered its Order and Judgment on June 29, 1993 (Appendix, Page 3) the Tenth Circuit Court of Appeals entered an Order Denying Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc on August 23, 1993 (Appendix, Page 8).

CONSTITUTIONAL PROVISION

"Amendment IV. The right of the people to be secure in their persons, houses, papers and effects against reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched and persons or things to be seized."

THE FACTS

The parties in their initial Pre-Trial Report , the Pre-Trial Order and at trial stipulated to the following facts:

1. On Friday, June 29, 1991, at approximately 11:43 p.m. GIRARD and TRIMMER along with other officers responded to a report of a loud party in the 3200 block of Walnut Street in Los Alamos, Los Alamos County, New Mexico.

2. Upon TRIMMER's arrival at the scene he heard several people yelling loudly inside of 3272 A Walnut Street.

3. TRIMMER and GIRARD went to the front door of the residence.

4. TRIMMER looked in the window of the front door and observed an individual later identified as David Danforth ("Danforth") who he knew to be under the age of 21 years.

5. TRIMMER observed Danforth open a can of Miller Genuine Draft beer.

6. TRIMMER observed Eric Hall ("Hall") sitting on a couch in the living room playing cards. There were several open beer containers in front of Hall on the table he was playing on. TRIMMER knew Hall to be under the age of 21 at the time.

7. TRIMMER told GIRARD that he could see an individual who he recognized to be a minor with a beer can in his hand. GIRARD told TRIMMER to knock on the door.

8. Upon TRIMMER knocking on the door there was a shout of "cops" from inside the residence and many footsteps could be heard running toward the back of the house and other footsteps going up a stairway.

9. The door was opened by JASON. JASON was informed that a minor had been observed drinking in the residence and that the police were coming in. JASON blocked the door denying entrance to GIRARD and TRIMMER and told GIRARD and TRIMMER that they could not enter the house.

10. GIRARD and TRIMMER told JASON that they were coming in and ordered him to move.

11. JASON continued to block the door.

12. GIRARD and TRIMMER pushed the door open as JASON continued to try to force the door closed.

13. As soon as GIRARD and TRIMMER entered the house, TRIMMER placed JASON under arrest for resisting the lawful order of a police officer contrary to Section 30-22-1D, NMSA 1978 Comp.

14. TRIMMER then made contact with JUSTIN who informed him that he also lived in the house. TRIMMER then placed JUSTIN under arrest for buying, selling, or giving alcohol to minors contrary to Section 60-7B-1(A)(4), NMSA 1978 Comp. JUSTIN and JASON were then both hand-cuffed and placed on a couch in the living room.

15. JASON and JUSTIN stated to TRIMMER that they had not given any alcohol to anyone.

16. TRIMMER informed them by having alcohol on the premises and permitting minors and juveniles to consume the alcohol on the premises constituted the charge. JASON and JUSTIN were transported to the Los Alamos Police Department and booked at the County jail. At that time TRIMMER informed JASON and JUSTIN that he was also charging them with disorderly conduct because of the initial complaint and the loud profane yelling he had heard coming from their residence contrary to Section 30-20-1, NMSA 1978 Comp.

17. The Magistrate Judge for the County of Los Alamos Marthanne Reinhard was then contacted and JASON and JUSTIN were released from jail on bond.

18. JASON was tried before a jury of six persons in the Magistrate Court of Los Alamos County on August 23, 1991.

19. At the time TRIMMER and GIRARD took the above actions they were acting under the color of the state law specified above.

THE CLEARLY ESTABLISHED LAW

William Pitt the Elder in the 1700's in an address to the House of Commons set forth the basic principle of common law in regard to the sanctity of a person's home:

> "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; it's roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dares not cross the threshold of the ruined tenement." *The Right of the People to Be Secure*, Charles E. Moylan, Jr., National College of District Attorneys, Second Edition.

This Court in a decision written by Mr. Justice Stevens in Payton v. New York reviewed the history of the adoption of this principle of law in our country.

> "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."

The Payton Court noted that:

> "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born'."

The Payton Court described the adoption of the Fourth Amendment:

> "Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures. As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause..."

The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Payton Court went on to state that:

> "It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general

warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment ... As the Court reiterated just a few years ago, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. As Mr. Justice Jackson so cogently observed in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436: 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern

> to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

The Payton Court then stated:

> "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable. As the Court stated in Coolidge v. New Hampshire 'Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property--his home or office--and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'."

THE EXCEPTION

This Court in Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 80 L.Ed.2 732 (1984) applied the above principles to facts very similar to those stipulated to by the parties when it held that warrantless, night time entry into a home to arrest an individual for driving under the influence of an intoxicant was prohibited by the Fourth Amendment.

> "Consistently with these long-recognized principles, the Court decided in Payton v. New York, supra, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. Id., 445 U.S., at 583-590, 100 S.Ct., at 1378, 1382. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, id., at 583, 100 S.Ct., at 1378, thereby leaving to the lower courts the initial application of the exigent-circumstances exception. Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' United States v. United States District Court, 407 U.S., at 318, 92 S.Ct., at 2137, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."

The Welsh Court at page 750 went on to state:

> "Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is especially appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. See Payton v. New York, supra, 445 U.S., at 586, 100 S.Ct., at 1380. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate. Even the dissenters in Payton, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests. See 445 U.S., at 603, 616-617, 100 S.Ct., at 1388, 1395-1396 (WHITE, J., dissenting) ('The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes.'). This is not a novel idea. Writing in concurrence in McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153

(1948), Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed:

"Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime.... While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think that its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer

> undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." Id., at 459-460, 69 S.Ct., at 195-196 (Jackson, J., concurring)

The Welsh Court then surveyed various holdings of the lower courts and found at page 751 that:

> "most have refused to permit warrantless home arrests for nonfelonious crimes."

The Welsh Court then stated:

> "We therefore conclude that the common sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on 'unreasonable searches and seizures,' and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see Payton, supra, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed."

The Tenth Circuit's decision relies on the case of Bledsoe vs. Garcia, 742 F.2d 1237, 1241 (10th Cir. 1984) which was filed three months after this Court announced its decision is Welsh. The Tenth Circuit in Bledsoe found that it was appropriate for policemen to pursue a sailor who had just admitted to them while he was outside his home that he was AWOL and who then fled into his home. The Bledsoe Court stated "the unauthorized absence from the military unit for almost two months is a serious offense." Four years later (and three years before the invasion of the Stege home) the Tenth Circuit in the case of United States v. Aquino , 836 F.2d 1268 (1988) in applying Welsh established the rule in that Circuit when it stated at page 1270 that:

> " '[T]he most basic constitutional rule' in the search and seizure area is that exceptions to the warrant requirement must be 'specifically established,' 'well delineated' and 'jealously and carefully drawn.' [FN3] Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). The notion that emergency circumstances may in appropriate cases make a warrantless search constitutional if probable cause exists is a clearly established exception to the warrant requirement. Welch v. Wisconsin, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984). The

contours of a sufficient emergency, however, remain unclear. See Coolidge, 403 U.S. at 455, 91 S.Ct. at 2032 (exception to warrant requirement requires 'that the exigencies of the situation made that course imperative'). Because this is the third drug investigation/exigent circumstance case to reach this court in the past year, see United States v. Chavez, 812 F.2d 1295 (10th Cir.1987); United States v. Mabry, 809 F.2d 671 (10th Cir.1987), we examine the question closely. We begin by exploring the relevant Supreme Court pronouncements on the issue. When police seek to enter a home without a warrant, the government bears the burden of proving that sufficient exigency exists. See Coolidge, 403 U.S. at 455, 91 S.Ct. at 2032; Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 1971, 26 L.Ed.2d 409 (1970). Because "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980), this burden is especially heavy when police seek to enter a suspect's home even pursuant to a legitimate seizure. See Vale, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (proper street arrest pursuant to a warrant does not justify house search); Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) (search warrant required to arrest individual in the home

> of a third person); Payton, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (arrest warrant required to seize a person in his own home)."

The Aquino Court then established the test for the Tenth Circuit as follows:

> "The Supreme Court cases discussed above mandate the following conclusions: An exception to the warrant requirement that allows police fearing the destruction of evidence to enter the home of an unknown suspect should be (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of the evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse. Accordingly, the test in this circuit requires probable cause and exigent circumstances."

APPLICATION OF THE FACTS TO THE RULE AND EXCEPTION

Defendants below relied on United States v. Carr ,939 F.2d 442, (10th Cir. 1991) as analogous to the facts of this case to support their contention that their warrantless entry of the Stege home and arrest of the

Plaintiffs was justified. Plaintiffs submit that Carr is a good example of what is required of law enforcement officers in the Tenth Circuit. Carr demonstrates the failure of Defendants Girard and Trimmer to meet the requirements of this Court and the Tenth Circuit. Using the guidelines established in United States v. Acquino, 836 F.2d 1268 (10th Cir. 1988) the following is a contrast between the Carr case and this case. The Carr Court at page 1447 set forth the facts of that case.

A. Clear Evidence of Probable Cause. At the point Defendants Girard and Trimmer decided to enter the Stege home without a warrant their evidence consisted of having observed an individual who Cpl. Trimmer knew to be between the ages of 18 and 21 with a can of beer in his hand. In addition Lt. Girard heard "loud talking and music coming from the open windows" . The possible offenses of minor in possession of alcohol and disorderly conduct are both petty misdemeanors under the laws of the State of New Mexico (Sections 30-20-1A and 60-7B-1(D) NMSA 1978 Comp. Disorderly conduct under the statute is defined as "engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace". Since the loud talking and music could be heard by the officers approaching the residence from open windows

on a summer night it is arguable whether the noise from the party was unreasonably loud. Further, Section 60-7B-1(D) makes it an offense for a minor to be in possession of alcohol only "outside the presence of the minor's parent, guardian, adult spouse or adult person into whose custody a Court has committed the minor for the time". Defendants from peeking in the Steges' window could not be certain that either Mr. Danforth or Mr. Hall's parents were not present at the party

B. Circumstances Involving Serious Crimes and Where the Destruction of Evidence is Likely. The officers in the Carr case suspected the occupants of a motel room were trafficking in cocaine (a second degree felony under Section 30-31-20 NMSA 1978 Comp.) and distributing Phencyclidine (a third degree felony under Section 30-31-22 NMSA 1978 Comp.). The Defendants have maintained that David Danforth, a 19 year old adult (Criminal Complaint, Section 28-6-1 NMSA 1978 Comp.) holding a can of Miller beer in his hand and presumably talking loudly is in the same class of "serious crime" offenders as the defendants in Carr. This Court evaluates the actions of the Defendants upon the basis of the evidence they had prior to the entry of the Stege home not what evidence was gained after the warrantless entry. If the facts of this case support a definition of a serious crime, one

must ask what crime would not meet that definition? In fact, Defendant Trimmer, under examination by his own counsel, acknowledged that Los Alamos does not have what is generally considered serious crime such as crimes of violence.

C. Limited in Scope to the Minimum Intrusion Necessary to Prevent Destruction of Evidence. The officers in the Carr case stated that they decided to speak with the occupants of Room 230 "in the hope that the occupants would consent to a search of the motel room." The Stipulated Facts and Defendant Trimmer's testimony demonstrate that Jason clearly manifested to the Defendants that they did not have consent to enter his home. The Carr officers acknowledged that they obtained a pass key to Room 230 and that they planned to use the key to gain entry in order to detain the occupants if the occupants should refuse permission to search the motel room and had that occurred the officers planned to undertake a protective sweep and detain the occupants until a search warrant could be obtained. The officers in the Carr case after they entered the room limited their actions to securing the room and suspects. No search of the room was conducted until a search warrant was obtained about two hours later. In contrast, Defendants Girard and Trimmer have never indicated that they even considered the need for

obtaining a search warrant either before or after their entry into the Stege home. Rather, under Defendant Girard's orders the police arrested all 25 persons present at the Stege residence and seized 70 open cans and bottles of beer. The Tenth Circuit in United States v. Mendoza-Salgado 964 F.2d 993, 1010 (10th Cir.1992) recently expressed its concern in this regard:

> "Although we do not decide the issue here, we express our deep concern over the agents' failure to begin the warrant process before entering Mr. Garcia's house. This court has 'never held that police can automatically justify the warrantless entry of a home merely by engaging in a two-part drug transaction and interrupting it after the first part.' United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir.1988). We note that our previous cases involving exigent circumstances have emphasized that the police 'began the process of obtaining a warrant as soon as they had probable cause.' Aquino, 836 F.2d at 1273-74. Here it appears agents had several hours to initiate attempts to obtain a warrant. As we noted in Aquino, "[t]he officers' failure to begin the process of obtaining a warrant is especially troubling in a case involving a home, concerning as does the privacy interests of innocent individuals who might, as here, be living with the suspected drug dealer." Id. at 1274. Not only does proper observance of the

> warrant requirement protect individuals' privacy interests, but it also prevents police from needlessly jeopardizing the government's case against suspected drug dealers." Id.; see also United States v. Chavez, 812 F.2d 1295, 1300 (10th Cir.1987).

It is interesting to note that the magistrate jury had the similar criticism of the Defendants' actions in this case. The jury was required to consider the lawfulness of Defendant Trimmer's order to Jason Stege that the police be allowed into the house in order to determine Jason's guilt or innocence on the charge of resisting the lawful order of a police officer. The jury convicted Jason of disorderly conduct but acquitted Jason of the charges of resisting the lawful order of a police officer and the charge of selling or giving alcohol to minors. The jury requested and was granted an opportunity to explain its verdict to the magistrate and the parties. The jury's rationale was that the entry of the Stege home was illegal since the police had an opportunity to seek a search warrant after they looked into the window and before they knocked on the door. The exigent circumstances claimed by the police did not exist, according to the jury, since the evidence was undisputed that the occupants of the home were unaware of the presence of the police until after the police knocked on the door.

D. Exigent Circumstances. Defendants below argued that their warrantless entry into the Stege residence was justified by their concern that evidence was being destroyed, persons were attempting to escape out the back door and that there was a possibility that minors who had consumed alcohol would be driving on the streets of Los Alamos. A review of the Stipulated Facts and the record simply does not support this contention. With the police surrounding the residence how would the occupants of the residence be able to destroy or dispose of 70 cans of beer? How would they flee? In fact, those who did attempt to flee were detained by the police in the back. With the Stege home surrounded how could the persons present drive on the streets of Los Alamos without first passing police inspection outside the home. Indeed, on page 1 of the Lt. Girard's Narrative Report of the incident dated July 2, 1991, he states "no one in the residence appeared to be impaired and after they were identified, they were told to leave". The Tenth Circuit has defined exigent circumstances in United States v. Smith, 797 F.2d 836, 840 (10th Cir.1986) as arising when:

> (1) the law enforcement officers ... have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search [is not] motivated by an intent to arrest and seize evidence,

> and (3) there [is] some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched. U.S. v. Butler (Billy Deon), --- F.2d ----, 1992 WL 341796 (10th Cir.(Okl.), Nov 23, 1992) (NO. 91-7128)

The trial court in ruling for the Defendants found not only were they entitled to qualified immunity but that their actions were lawful. To accept the court's ruling that Defendant's actions were lawful would be contrary to the rule that "[T]he most basic constitutional rule" in the search and seizure area is that exceptions to the warrant requirement must be "specifically established," "well delineated" and "jealously and carefully drawn." Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) United States v. Aquino , 836 F.2d 1268 (1988) .

CONCLUSION

Sir Edward Coke wrote in 1644 that "a man's house is his castle." Perhaps we have to retire the Fourth Amendment as a centuries old anachronism unsuitable for today's law and order society. We will do so if police are able to utter the magic words "exigent circumstances" like "open sesame" to dispense with the warrant requirement for the entry into a person's home.

We would likewise do so if we allow the words "qualified immunity" to become an impervious shield for officers who violate established constitutional rights. Plaintiffs-Appellants urge this Court to stop the Fourth Amendment's slide down the slippery slope of exceptions into oblivion. The time has come for this Court to give effect to its many pronouncements of the sanctity of a person's home and hold Defendants liable for their unwarranted violation of Plaintiffs' rights to be secure in their home.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JASON STEGE, JUSTIN STEGE	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	**(No. CIV-**
	)	**91-**
	)	**1087-**
	)	**SC)**
C. JOSEPH GIRARD, MITCHELL B. TRIMMER	)	
	)	
	)	
Defendants-Appellees.	)	**Filed**
	)	**10/22/92**

JUDGMENT IN A CIVIL CASE

This action came to trial before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's oral motion for judgment as a matter of law at the close of plaintiff's evidence is GRANTED, and plaintiffs JASON STEGE and JUSTIN STEGE to take nothing and the action is dismissed on the merits for the reasons outlined in the memorandum of the court (attached). Defendants C. JOSEPH GIRARD and MITCHELL B. TRIMMER to recover their costs of action.

Dated this 21st day of October, 1992 at Santa Fe, New Mexico.

/s/ Dale Saffels
United States
District Judge

MOTION TO DISMISS

Based upon the evidence presented by the plaintiffs in their case-in-chief and the previously stipulated facts, the court finds that the defendants' motion to dismiss on the basis of qualified immunity must be granted and the case dismissed.

The law is clearly established that there must be probable cause and exigent circumstances to do a warrantless search and seizure. Further, police officers must have probable cause to arrest individuals without a warrant.

Under the facts of this case, it was objectively legally reasonable for the defendants to believe they could enter the Stege residence and seize evidence without a warrant, and arrest the plaintiffs for certain criminal offenses without a warrant. The police officers saw evidence of serious offenses being committed within the house with minors consuming and possibly being furnished alcohol. When people began fleeing

after the officers knocked on the door, there was a concern about the destruction of evidence as well as the escape of the suspects. The defendants had observed violations of the law both from outside the house and in their presence to suggest to them that they had probable cause to arrest the plaintiffs.

By entering the Stege residence and arresting the plaintiffs, a reasonable police offer would not have believed he or she was violating the civil rights of the plaintiffs. Based upon the facts before this court, it is clear the defendants are entitled to qualified immunity.

The court, therefore, grants the defendants' motion to dismiss. The plaintiffs' motion for summary judgment is denied.

Even if the defendants were not entitled to qualified immunity, the court would direct a verdict for the defendants. On the facts of this case, it is clear that the police officers acted lawfully and there can be no liability for their actions.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JASON STEGE, JUSTIN STEGE	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 92-2231
	)	(D.C. No. CIV-91-1087-SC)
	)	
C. JOSEPH GIRARD, MITCHELL B. TRIMMER	)	(D.N.M.)
	)	
Defendants-Appellees.	)	Filed 6/29/93

ORDER AND JUDGMENT*

Before SEYMOUR and TACHA, Circuit Judge, and ROGERS,** Senior District Judge

**Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R 34.1.9. The case is therefore ordered submitted without oral argument.

In this civil rights action, 42 U.S.C. § 1983, plaintiffs appeal the district court's decision directing a verdict in favor of defendants following the close of plaintiffs' case-in-chief. This litigation stems from an incident during which defendants, Los Alamos, New Mexico, police officers, entered plaintiffs' home during the course of a party involving underage individuals drinking beer and arrested plaintiffs without either search or arrest warrants. The district court determined that defendants were entitled to qualified immunity and, alternatively, that they were, as a matter of law, entitled to judgment in their favor because they had acted lawfully.

This court reviews a directed verdict de novo. See First Sec. Bank v. Taylor, 964 F. 2d 1053, 1055 (10th Cir. 1992) (reviewing denial of directed verdict). "A directed verdict is appropriate only if the evidence, viewed in the light most favorable to the nonmoving party, 'points but one way and is susceptible to no reasonable inferences supporting' the nonmoving party." Riggs v. Scrivner, Inc.,, 927 F. 2d 1146 , 1149 (10th Cir) (quoting Zimmerman v. First Fed. Sav.

& Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988)), cert. denied, 112 S. Ct. 196 (1991). Because we conclude that defendants were entitled to qualified immunity, we need not address whether defendants' conduct was lawful.

"[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 819 (1982)). Once defendants asserted qualified immunity, plaintiffs bore the burden of establishing both that defendants' alleged conduct violated the law and that the law was clearly established when the alleged violation occurred. See Patrick v. Miller, 953 F.2d 1240, 1243 (10th Cir. 1992). Because plaintiffs failed to establish that defendants' alleged conduct violated law clearly established at the time of this incident, defendants were entitled to qualified immunity.

Plaintiffs argue, among other things, that the offenses involved in this case are not sufficiently serious to justify the warrantless entry. Under New Mexico law, the offenses implicated by these

circumstances include disorderly conduct and the possession by, and the provision of liquor and alcoholic beverages to, those under age twenty-one, which are petty misdemeanors, see N.M. Stat. §§30-20-1, 60-7B-1D, 60-7B-1.1F; see also N.M. Stat.§ 60-7A-25A (persons violating any provision of New Mexico's Liquor Control Act that is not designated as a felony, are guilty of a petty misdemeanor), punishable by not more than six months' imprisonment or a fine of no more than $500, or both, see N.M. Stat. §31-19-1. The offense of contributing to the delinquency of a minor, a fourth degree felony, see N.M. Stat. §30-6-3, punishable by eighteen months' imprisonment and a $5,000 fine, see N.M. Stat.§ 31-18-15, was also implicated.

At the time of this incident, June 19, 1991, the Supreme Court had held that a noncriminal civil forfeiture offense for which no imprisonment was possible was not a sufficiently serious offense to justify a warrantless entry, despite the existence of probable cause and exigent circumstances. Welsh v. Wisconsin, 466 U.S. 740, 754 (1984). Further, this court had held that a misdemeanor punishable by less than one year's imprisonment could be a sufficiently serious offense to justify a warrantless home entry. See Bledsoe v. Garcia, 742 F.2d 1237, 12241 (10th Cir. 1984).

While the existence of clearly established law does not require that there be relevant authority addressing the specific circumstances presented in this particular case, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640. The law at the time of this incident did not clearly establish whether these offenses were sufficient to justify a warrantless entry based upon probable cause and exigent circumstances. We, therefore, agree with the district court that an objectively reasonable officer could have believed that the warrantless entry was lawful.

Plaintiffs' remaining arguments are unpersuasive. The judgment of the United States District Court for the District of New Mexico, is, therefore, AFFIRMED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

No. 92-2231,
Stege v. Girard

SEYMOUR, Circuit Judge, dissenting:
I dissent

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JASON STEGE, JUSTIN STEGE	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 92-2231
	)	
C. JOSEPH GIRARD, MITCHELL B. TRIMMER	)	
	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT*
Entered August 23, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and ROGERS,* Senior District Judge.

*Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

This matter is before the court on appellants' petition for rehearing with suggestion for rehearing in banc.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Judge Seymour, however, would grant rehearing. The petition is, therefore, denied on the merits.

The petition have been denied on the merits by the panel to which the case was submitted, the suggestion for rehearing in banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35 (b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: Patrick Fisher
Chief Deputy Clerk

Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE OF THE CLERK

No. 93-742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JASON STEGE and JUSTIN STEGE,
Petitioners,

v.

C. JOSEPH GIRARD and MITCHELL B. TRIMMER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a reasonable police officer under the doctrine of qualified immunity and under the circumstances of this case could have believed the warrantless entry to be lawful in light of clearly established law and the information the searching officers possessed at the time.

It was the decision of the Tenth Circuit that the law at the time of this incident did not clearly establish whether the offenses being committed by the Petitioners were sufficient to justify a warrantless entry based on probable cause and exigent circumstances. The Tenth Circuit agreed with the United States District Court for the District of New Mexico that an objectively reasonable officer would have believed that the warrantless entry was lawful.

Petitioners mistakenly imply that the decision of the Tenth Circuit Court of Appeals was based on the conclusion by the Tenth Circuit that the offense of contributing to the delinquency of a minor (a fourth degree felony under New Mexico statutes) was implicated by the Respondents as the reason for making the warrantless search. The issue of whether a public official is entitled to qualified immunity is determined by an objective standard in light of clearly established law and the information possessed by the searching officers. The searching officer's subjective belief about the search is irrelevant to a determination of whether a public official is entitled to qualified immunity.

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RESPONDENTS' APPENDIX

Affidavit of Mitchell B. Trimmer, filed in the United States District Court for the District of New Mexico on February 14, 1992 ..... 1a

Affidavit of C. Joseph Girard, filed in the United States District Court for the District of New Mexico on October 19, 1992 ..... 5a

STATEMENT OF THE CASE

Petitioners brought this civil rights action for alleged violation of their civil rights in the United States District Court of the District of New Mexico on October 31, 1991. The action arises out of an incident which occurred on June 29, 1991, shortly before midnight, in which Respondents, Los Alamos, New Mexico police officers responded to a report of a party at Petitioners' home. Respondents entered Petitioners home without search warrants during the course of the party which involved underage individuals consuming alcohol and subsequently arrested Petitioners. At the trial on the merits, following the close of Petitioners case-in-chief, the District Court directed a verdict in favor of Respondents based upon its determination that Respondents were entitled to qualified immunity. The Tenth Circuit Court of Appeals affirmed the District Court on grounds that at the time of the incident, the law did not clearly establish whether the offenses involved were sufficient to justify a warrantless entry based upon probable cause and exigent circumstances and that an objectively reasonable officer could have believed that the warrantless entry was lawful.

In addition to the Statement of Facts in Petitioners' Petition for a Writ of Certiorari, the following facts are material to the consideration of the question presented.

1. Upon arrival at the Stege residence, Lieutenant Girard observed a large number of automobiles parked in front of the residence. (Appendix, p. 5a).

2. Lieutenant Girard believed a number of offenses were being committed in the Stege residence includ-

ing the offenses of disorderly conduct, minor in possession of alcohol, tampering with evidence and giving alcohol to a minor. (Appendix, p. 6a).

3. Lieutenant Girard believed evidence was being destroyed once persons inside the Stege residence found out police were outside. *Id.*

4. A number of persons at the party in question were apprehended attempting to flee the party from the back door of the residence by officers assisting Respondents' in response to the report of a loud party in progress. (Appendix, pp. 6a).

5. Open beer cans and bottles were scattered everywhere in the residence. (Appendix, p. 6a).

6. Approximately 10 to 12 underage individuals were found hiding in bedroom and bathroom closets. *Id.*

7. Approximately 25 individuals were present in the residence at the time of the officers' entry. (Appendix 7a).

8. Corporal Trimmer had seen David Danforth, an underage individual, drinking alcohol prior to Trimmer's entry into the house. David Danforth was found by Officer Trimmer in an upstairs closet hiding behind a pile of clothes. (Appendix, pp. 1a, 2a).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari fails to demonstrate that this case is appropriate for review by this Court. The authorities relied upon by Petitioners do not establish that the decision of the Tenth Circuit Court of Appeals was in error or in conflict with federal or state law. None of the general considerations governing review on writ of certiorari outlined

in Supreme Court Rule 10 or other special reasons exist to justify review by this Court.

In this case involving whether Respondents were entitled to qualified immunity, the law in existence at the time of the incident created a gray area as to whether the offenses involved were sufficiently serious to justify a warrantless entry and search. Petitioners have not met their burden of establishing that the law clearly established Respondents were not entitled to qualified immunity based on the circumstances surrounding the warrantless search. Because the law was not clearly established that the conduct of Respondents was in violation of the law, the Tenth Circuit correctly concluded that Respondents were entitled to qualified immunity.

In light of the circumstances at the time of the incident, it was reasonable for Respondents to conclude that the warrantless entry and search was supported by probable cause and exigent circumstances and that their conduct was lawful. Serious crimes involving the provision to and consumption of alcohol by minors were committed in plain view of Respondents and under the circumstances of the case, the destruction of evidence was likely. Petitioners have failed to demonstrate that it was unreasonable, in light of clearly established law and the circumstances of the case, for Respondents to conclude that their actions were consistent with Petitioners Fourth Amendment rights.

ARGUMENT

A. Petitioners Have Failed To Establish Sufficient Grounds For Review Of This Case On Writ Of Certiorari

A petitioner for writ of certiorari must demonstrate that there are "special and important reasons" why this Court should review the case. Sup. Ct. R. 10.1. The Tenth Circuit Court of Appeals determined that Respondents were entitled to qualified immunity because the law at the time of the incident did not clearly establish that the warrantless entry and the subsequent arrests by Respondents was in violation of the law. As is demonstrated more fully below, the authorities relied upon by Petitioners do not support a conclusion that the Court of Appeals decision is in error. The Petition for Writ of Certiorari should be denied because Petitioners have failed to show that this case involves any of the general considerations governing review on writ of certiorari outlined in Supreme Court Rule 10 or that other special reasons exist to justify review by this Court.

B. Petitioners Failed To Establish That The Conduct Of Respondents Violated Law Clearly Established At The Time Of The Incident

An assertion of qualified immunity is properly evaluated under the standard enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982). In *Harlow*, this Court held that government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know. *Id.* at 818, 73 L.Ed. 2d 396, 102 S.Ct. at 2738. Operation

of the objective standard established in *Harlow* depends upon whether the contours of the constitutional or statutory right are sufficiently clear that a reasonable officer would understand that what he is doing violates that right; "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L.Ed. 2d 523, 107 S.Ct. 3034, 3039 (1987). The Tenth Circuit Court of Appeals correctly concluded that the law at the time of the incident in question did not clearly establish that the offenses were not sufficiently serious to justify a warrantless entry and that an objectively reasonable officer could have believed that the warrantless entry was lawful.

Once a defendant asserts qualified immunity, it becomes the plaintiff's burden to show that the law was clearly established. *Patrick v. Miller*, 953 F.2d 1240, 1243 (10th Cir. 1992). Petitioners failed to meet this burden by doing precisely what this Court has indicated is insufficient. Petitioners have failed to do more than identify in the abstract a clearly established right to be free from a warrantless search of one's home which Respondents have violated. See *Anderson*, 483 U.S. at 640, 97 L.Ed. 2d 523, 107 S.Ct. at 3039. Petitioners have not shown that at the time of the incident, it was clearly established that the circumstances with which Respondents were confronted did not constitute probable cause and exigent circumstances.

Petitioners seem to rely on this Court's decision in *Payton v. New York*, 445 U.S. 573, 63 L.Ed. 2d 639, 100 S.Ct. 1371 (1980) in support of their position that the law was clearly established at the time of the incident. *Payton* holds "that the Fourth Amendment

* * * prohibits the police from making a warrantless and non-consensual entry into a suspects home in order to make a routine felony arrest." *Id.* at 576, 63 L.Ed. 2d 639, 100 S.Ct. at 1374-75. This Court in *Payton* expressly acknowledged that it did not consider the type of exigent circumstances that would justify a warrantless entry into a home. *Id.* at 583, 63 L.Ed. 2d 639, 100 S.Ct. at 1378. Therefore, *Payton* did not make clear that the conduct of the Respondents was a violation of law.

Petitioners rely further on *Welsh v. Wisconsin*, 466 U.S. 740, 754, 80 L.Ed. 2d 732, 104 S.Ct. 2091 (1984). As the Tenth Circuit Court of Appeals correctly observed, the Supreme Court held in *Welsh v. Wisconsin* that a noncriminal civil forfeiture offense for which no imprisonment was possible was not a sufficiently serious offense to justify a warrantless entry even if probable cause and exigent circumstances existed. The Tenth Circuit had also held that a misdemeanor punishable by less than one year's imprisonment could be a sufficiently serious offense to justify a warrantless home entry in *Bledsoe v. Garcia*, 742 F.2d 1237, 1241 (10th Cir. 1984). The offenses implicated in this case, which included destruction of evidence, disorderly conduct, the possession by and the provision of liquor and alcoholic beverages to minors (*see* NMSA 1978, §§ 30-20-1, 60-7B-1D, 60-7B-1.1F), fell within the gray area between the situation held to constitute an unlawful entry and seizure in *Welsh* and the situation in *Bledsoe* which was held to constitute a lawful warrantless entry. It was, therefore, not legally apparent at the time of the incident in light of clearly established law that a warrantless entry under the circumstances of this case was a violation of law.

Petitioners mistakenly argue that *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988), provides a clear statement of when warrantless entries and searches are lawful in the Tenth Circuit. In *Aquino*, the Tenth Circuit Court of Appeals noted that the contours of a sufficient emergency to justify a warrantless search for evidence remain unclear. *Id.* at 1271 *citing Cooledge v. New Hampshire*, 403 U.S. 443, 455, 29 L.Ed. 2d 564, 91 S.Ct. 2022, 2032 (1971). *Aquino* established the test in the Tenth Circuit for warrantless searches where police fear the destruction of evidence. The court held that an exception to the warrant requirement under such circumstances should be:

> (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of the evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.

Id. at 1272. *Aquino* was decided in the context of a drug investigation and claimed exigent circumstances. *Aquino* did not address other types of "serious crimes" which would or would not justify a warrantless entry and search. Thus, *Aquino* provides no further guidance to police officers nor does the decision make it apparent that the crimes of destruction of evidence, disorderly conduct, possession by and the provision of liquor and alcoholic beverages to a minor are not sufficiently serious to justify a warrantless entry and search.

C. It Was Reasonable For Respondents To Believe That The Warrantless Entry and Search In This Case Was Lawful

As noted above, the relevant question where there is a claim of qualified immunity is whether a reasonable officer could have believed the warrantless entry and search to be lawful. *Anderson, supra,* 482 U.S. at 641, 97 L.Ed. 2d 523, 107 S.Ct. at 3040. Whether probable cause and exigent circumstances actually existed at the time is not the issue. As this Court noted in *Anderson,* the Supreme Court has "frequently observed" and "many cases on point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson,* 483 U.S. at 644, 97 L.Ed. 2d 523, 107 S.Ct. 3041. This Court has also recognized that it is inevitable that law enforcement officials will in some cases *reasonably but mistakenly conclude* that probable cause or exigent circumstances are present and that in such cases those officials should not be held personally liable. *Id.* at 641, 97 L.Ed. 2d 523, 107 S.Ct. at 3039-40. Whether a police officer acted reasonably depends upon the information possessed by the searching officers at the time of the incident. *Id.*

Applying the facts to the law, it was objectively legally reasonable for the Respondents to conclude that the warrantless entry and search was supported by probable cause and exigent circumstances and, as demonstrated above, it was not clearly established that the offenses involved were not sufficiently serious to justify a warrantless entry and search. Probable cause exists when known facts and circumstances are sufficient to warrant a prudent, cautious and

trained police officer to believe that a serious crime has been, or is being, committed. *United States v. Chavez*, 812 F.2d 1295 (10th Cir. 1987), *citing United States v. McEachin*, 670 F.2d 1139, 1142 (D.C. Cir. 1981); *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985); *United States v. Herring*, 582 F.2d 535 (10th Cir. 1978). It is undisputed that Respondents arrived at the Stege residence in response to a call that a loud party was in progress and that they heard yelling when they arrived on the scene. From the front door of the residence Respondents could see, in plain view, through a window, that minors were consuming alcohol. Inspecting objects which come into plain view lawfully is not a search. *United States v. Jimenez*, 864 F.2d 686 (10th Cir. 1988). Respondents knocked on the door, heard someone shout "cops" and heard footsteps running toward the back of the house and upstairs.

Respondents could see, in plain view, evidence that serious offenses involving the provision to and consumption of alcohol by minors were being committed. The destruction of evidence was likely because suspects and potential witnesses were fleeing. The intrusion was limited to that necessary to locate the minors and witnesses hiding, concealing, and/or destroying evidence in the house. It was reasonable for Respondents to believe that exigent circumstances existed because a prudent, cautious and trained officer would believe that prompt action was necessary to prevent escape of suspects and witnesses and destruction of evidence.

In *Aquino* case, probable cause to search Aquino's home existed despite the fact that the police were not certain that the cocaine in question came from

Aquino. The police followed one suspect to the home of another who then traveled to and from Aquino's home. Consequently,

> the facts and circumstances within their . . . knowledge and of which they had reasonably trustworthy information [were] sufficient in themselves to warrant a man of reasonable caution in the belief that [the cocaine was located in Aquino's home].

United States v. Aquino, 836 F.2d at 1272-73, citing *Dunaway v. New York*, 442 U.S. 200, 208, n. 9; 99 S.Ct. 2248, 2254, n. 9 (1979). In *Aquino*, the police had probable cause despite their lack of certainty. In this case, Respondents were certain, based upon their non-intrusive observations and actual knowledge of the ages of the minor consuming alcohol, that a serious crime was being committed.

In *United States v. Chavez*, 812 F.2d 1295 (10th Cir. 1987), both probable cause and exigent circumstances existed so as to justify a warrantless search, seizure and arrest. The police were justified in believing that "buy money" and illegal drugs were located at the premises they searched based upon their surveillance. Even more so in the case at bar, Respondents actually saw the crime being committed. Exigent circumstances existed in *Chavez* because the police reasonably believed that the drugs and money would be concealed or destroyed. Likewise, in this case, Respondents, who heard someone shout "cop" and then heard running feet, could reasonably conclude that suspects were fleeing and/or destroying evidence.

In *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985), the officers, smelling a substance associated with transporting cocaine and observing the curious way in which the speakers were mounted in an automobile, had sufficient probable cause to search without a warrant. In the case at bar, the officers actually observed the crime being committed. In *United States v. Herring*, 582 F.2d 535 (10th Cir. 1978), the officer, smelling marijuana, observing the vehicle in which it was carried speeding and observing the flight of the suspects, had sufficient probable cause to justify stopping the vehicle and arresting the occupants.

This Court has held that law enforcement officers whose judgments in making the difficult determination of whether a particular search and seizure comports with the Fourth Amendment are objectively reasonable should be granted qualified immunity from personal liability. *See Anderson*, 483 U.S. at 644, 97 L.Ed. 2d 523, 107 S.Ct. at 3041. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-345, 89 L.Ed.2d 271, 106 S.Ct. 1092, 1098 (1986). Respondents have failed to show that Respondents knowingly violated the law in this case or that Respondents' determination that the warrantless entry and search was lawful was unreasonable. This case is, therefore, unsuitable for review by this Court on a writ of certiorari and Petitioners Petition for Writ of Certiorari should be denied.

CONCLUSION

The Tenth Circuit correctly found that the law at the time of the incident did not clearly establish that the offenses being committed by Petitioners in the

presence of Respondents were insufficiently serious to justify the warrantless entry and search based upon probable cause and exigent circumstances. The Petitioners bore the burden below of establishing that Respondents' alleged conduct violated law clearly proscribing their actions. Petitioners failed to establish that Respondents' alleged conduct violated law clearly established at the time of the incident. At the time of the incident, probable cause and clear indicators of exigent circumstances existed and an objectively reasonable officer could have believed that the warrantless entry and search was lawful. Respondents are, therefore, entitled to qualified immunity and Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CIVIL NO. 91-1087SC

JASON STEGE and JUSTIN STEGE,
Plaintiffs,

vs.

C. JOSEPH GIRARD and MITCHELL B. TRIMMER,
Defendants.

AFFIDAVIT OF MITCHELL B. TRIMMER

I, Mitchell B. Trimmer, having been first duly sworn and upon oath state as follows:

1. On June 29, 1991, I served as and am presently a member of the Police Department of the City of Los Alamos, State of New Mexico. This affidavit is directed to occurrences of that date.

2. At approximately 11:43 p.m., a female citizen called the Los Alamos Police Department to report a loud party at the 3200 block of Walnut Street. Lieutenant Girard, Detective Mazuranich, Officer Corcoran and I responded to the area. I was the first officer to arrive at the area and I heard several people yelling profanities or obscenities loudly inside 3272-A Walnut. The other officers arrived and we approached the residence. Officer Corcoran and Detective Mazuranich went to the rear of the house and Lieutenant Girard and I went to the front door.

3. I looked in the window of the front door and observed an individual later identified as David Danforth who I knew to be under the age of 21 years old. He was holding a can of Miller Genuine Draft beer in his hand and I ob-

served him open the can. I also observed Eric Hall sitting on the couch in the living room playing cards. There were several open beer containers in front of Eric Hall on the table he was playing on. I knew Eric Hall was under the age of 21.

4. When I knocked on the door of the house someone looked through the window in the door and yelled "cops." Everyone in the house began running either upstairs or out the back door. Another individual later identified as Jason Stege looked through the window in the door. I identified myself as a police officer and ordered him to open the door.

5. After a short period of time, Jason Stege opened the door part way and blocked the entrance with his body. I informed Mr. Stege that I had observed minors in possession of alcohol in the residence and told him to move away from the door so that we could come in. He told us we could not enter the house so Lieutenant Girard and I both told him that we were coming in and told him to move. Lieutenant Girard and I had to push the door open as Mr. Stege continued to try and force the door closed. As I entered the house I placed Jason Stege under arrest for resisting an officer.

6. I was informed by Jason Stege that this was his house. I identified another individual in the living room as Justin Stege. He told me he also lived in this house and that the house belonged to their mother who was out for the evening. I then placed Justin Stege under arrest for buying, selling or giving alcohol to minors.

7. After rounding up all the people at the party I was unable to find David Danforth. I went upstairs to look for him and found him in a closet in one of the bedrooms, concealed behind a large pile of clothes.

8. Due to the overwhelming evidence, a hundred or so containers of beer, Lieutenant Girard and I decided to

arrest all present for the offense of minor in possession of alcohol.

9. Due to extenuating circumstances involving numerous priority calls, all individuals were released from the residence after giving their names, date of birth, and address and phone numbers to an officer. All were released with the understanding that they would be summoned to court or contacted later for referral or criminal citation.

10. Lieutenant Girard and I picked up approximately 70 opened cans and bottles of beer, most of which had some quantity of alcohol in them. These were stored in two coolers that were in the living of the residence. The evidence was transported to the police department.

11. Jason and Justin Stege were transported to the Los Alamos Police Department jail and booked.

12. In entering the Stege residence without a warrant I was carrying out my duties as a law enforcement officer utilizing my own discretion in carrying out my duties. I believe I was acting within the law in entering the residence without a warrant based on the facts and circumstances stated above.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Mitchell B. Trimmer
MITCHELL B. TRIMMER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

The foregoing Affidavit of Mitchell B. Trimmer was acknowledged before me this 13 day of February, 1992, by Mitchell B. Trimmer.

/s/ John S. Silver
NOTARY PUBLIC

My commission expires:

12/26/93

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CIVIL NO. 91-1087SC

JASON STEGE and JUSTIN STEGE,
Plaintiffs,

vs.

C. JOSEPH GIRARD and MITCHELL B. TRIMMER,
Defendants.

AFFIDAVIT OF C. JOSEPH GIRARD

I, C. Joseph Girard, having been first duly sworn and upon oath state as follows:

1. On June 29, 1991, I served as a police officer of the City of Los Alamos, State of New Mexico. This affidavit is directed to occurrences of that date.

2. At approximately 11:43 p.m., I responded to the 3200 block of Walnut Street in Los Alamos, New Mexico on a report of a loud party in progress. Corporal Trimmer advised me by radio that he had located a party at 3272-A Walnut. Approaching the residence on foot, I could hear loud talking obviously coming from young voices and music coming from the open windows. After arrival I observed a large number of automobiles parked in front of the residence in question. After verifying the disorderly conduct, my intention was to request the inhabitants of the Stege residence to cease and desist the breach of the peace. Corporal Trimmer went to the front door and a moment later advised that he could see an individual, who he recognized to be a minor, with a can of beer in his hand.

3. I felt at this point it was appropriate to have Corporal Trimmer knock on the door and attempt to enter

the residence as I felt a number of serious crimes were being committed including the offenses of disorderly conduct, minor in possession of alcohol, tampering with evidence, and giving alcohol to a minor.

4. After Corporal Trimmer knocked on the door there was a shout of "cops" from inside and many footsteps could be heard running toward the back of the house and other footsteps going up the stairway. In my opinion at this time, it was important that we enter this residence immediately as it was apparent that evidence was being destroyed and that there was a possibility that the people attending the party would attempt to leave the residence to avoid the police officers who were present. If this were to happen, that would mean the potential for a number of minors who had been drinking intoxicating liquors to be driving on the streets of Los Alamos. Based on prior experience and training, when I heard running in the residence, I believed that the persons fleeing may be arming themselves with weapons and feared for the safety of my officers if I did not take immediate action.

5. Corporal Trimmer knocked two or three more times and the door was finally opened by Jason Stege. Mr. Stege was informed that a minor had been observed drinking and that the police officers were coming in. Mr. Stege refused to step aside and it was necessary to forcibly move him back from the door. He was placed under arrest by Corporal Trimmer. Two other police officers, Corcoran and Mazuranich, had gone around the back door at the sound of running feet and they had controlled a number of kids in the back yard. Almost everyone visible in the residence appeared to be a minor or juvenile. There were open beer cans and bottles scattered everywhere in the residence. I went upstairs and found approximately 10 to 12 more kids hiding in the bathroom and bedroom closets.

6. After entering the residence and considering the circumstances I considered that contributing to the delin-

quency of minors might be an appropriate charge against the Stege brothers.

7. After organizing the people at the party, it appeared that we were dealing with approximately 25 individuals. The two Stege brothers were taken into custody and transported to the station.

8. Corporal Trimmer and I picked up most of the beer containers in the residence. Most had some quantity of beer in them and they were dumped in the sink. I could see beer containers in the back porch and a trash can on the back porch was half full of beer containers.

9. In instructing my officers to enter the Stege residence I was carrying on my duties as a law enforcement officer using my own discretion in carrying out my duties. I believe I was acting within the law and could enter the residence without a warrant based on the circumstances which I described herein. I believe that I had probable cause to believe a serious crime was being committed at the Stege residence and that the circumstances which I described above would legally allow me to enter the residence without a warrant.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ C. Joseph Girard
C. JOSEPH GIRARD

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

The foregoing Affidavit of C. Joseph Girard was acknowledged before me this 9 day of October, 1992, by C. Joseph Girard.

/s/ ???????????
NOTARY PUBLIC

My commission expires:
12/26/96